

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 29, 2006

RUSSELL JENSEN v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Franklin County
No. 14,477 Robert Crigler, Judge**

No. M2006-00249-CCA-R3-PC - Filed December 28, 2006

The petitioner, Russell Jensen, appeals from the post-conviction court's order dismissing his petition for post-conviction relief, raising three issues for our review: (1) whether he was denied the effective assistance of counsel; (2) whether the trial court erred in denying his request for additional time to hire private counsel and refusing to allow his appointed attorney to withdraw; and (3) whether his guilty pleas were knowingly and voluntarily entered. Following our review, we affirm the post-conviction court's order of dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID G. HAYES and D. KELLY THOMAS, JR., JJ., joined.

Norris A. Kessler, III, Winchester, Tennessee, for the appellant, Russell Jensen.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; James Michael Taylor, District Attorney General; and Steven M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The petitioner was indicted on March 5, 2002, for five counts of rape of a child and five counts of aggravated sexual battery. Pursuant to a plea agreement, he pled guilty to three counts of aggravated sexual battery on February 6, 2003, Class B felonies, and was sentenced as a violent offender to ten years for Counts 6 and 8 and to eight years for Count 10, with the ten-year terms to be served concurrently with one another but consecutively to the eight-year term. The remaining charges were dismissed, and he did not appeal his sentences. At his submission hearing, the State summarized the evidence that underlay the indictments:

We believe the proof would show that during the time frame that the [petitioner] dated and lived with the victim's mother [sic]. This time frame would encompass back, Your Honor, to about 1997 through May of 2001. [The petitioner] befriended, in fact, fathered a child with the victim's mother. He befriended the victim. During that time frame the victim's mother began to work a second shift job. That the [petitioner] became the primary care giver during that second shift job and he slowly developed a relationship with the victim that included sexual contact, that this extended over several year [sic] period of time. I think that the proof would actually show that penetration occurred during some of these events. In any event there was sexual contact, she was less than 13 years of age. She ultimately came public [sic] with this knowledge when her mother and the [petitioner] broke off their relationship. He moved out of the home or actually the mother took the children out of their home, and at that point she came to her mother and told her mother what had been – was going on. The mother immediately notified local authorities who brought in the children services folks, Your Honor. They ultimately talked with the child and actually got a recording device and the child telephoned the [petitioner] on two occasions. On one of the occasions the recording device did not work, he made admissions during that telephone conversation. On the second occasion, Your Honor, the recording device actually worked and the [petitioner] acknowledged on the phone to the young lady the conduct and actually asked her not to tell anybody. Made statements like you weren't hurt down there, you shouldn't turn me in. I don't need to go to prison. You don't need to put your mother through this. Turning people in are for those folks that hurt little girls, and I never actually hurt you. We would produce that tape and it would have been played to the jury along with the child's testimony, Your Honor.

The petitioner filed a timely *pro se* petition for post-conviction relief on January 20, 2004. On February 4, 2004, counsel was appointed to represent the petitioner, and an amended petition was filed on July 13, 2004. Following an evidentiary hearing on November 18, 2005, the post-conviction court entered an order on January 19, 2006, denying relief and dismissing the petition.

At his evidentiary hearing, the petitioner testified that following his indictment, he was arrested and released on bond "[a]bout a month" later. He said at one of his initial appearances, around April 24, 2002, he told the trial judge he wanted to hire his own lawyer because appointed counsel "was obviously too busy to handle" his case. At approximately the same time, appointed counsel filed a motion to withdraw, which the trial court denied. The trial court continued the case until June 17, 2002, to give the petitioner time to hire his own lawyer.

The petitioner said that a private attorney had agreed to represent him for \$5000. He stated that at the time he was working at Red Lobster, "had a couple of thousand dollars saved up," and thought he would be able to get \$1500 to \$2000 more "around tax time" when his wife "got her tax check." He acknowledged that the trial court granted him additional continuances to hire a private attorney on June 17, July 25, August 29, September 20, and October 31 of 2002, and that he still had

not hired a lawyer by November 12, when the court denied his request for another continuance and set his case for trial on January 22, 2003.

On cross-examination, the petitioner said that if he had been given until around “February or March when the tax checks c[a]me out, I believe I would have had enough money to hire an attorney of my choice” and that he thought the trial judge “would give me all of the continuances I needed.” He also acknowledged that, at the time, he understood that he was going to be represented by appointed counsel at trial, but he did not attempt to contact counsel before the January trial date.

The petitioner stated that he did not discuss his case with trial counsel until his bond was revoked, at which time counsel called him at the jail “and called me a pervert over the phone and everything like that.” He confirmed that trial counsel met with him at the jail to discuss his case, but he did not tell counsel his version of the facts underlying the charges and said the only State evidence trial counsel showed him was “a tape of a phone conversation.” He said it was his understanding that “it was pretty much [the victim’s] word . . . against mine and the tape was enough to condemn me.” He also testified that counsel never interviewed his father or brother as he had requested.

Regarding why he pled guilty, the petitioner said, “Pretty much at that point I was just tired of it. I felt like I was being punished for being poor because I couldn’t afford a lawyer. . . . I felt like if I did go to trial I was going to get a lot of time.” He also said that he was confused about what percentage of his sentence he would have to serve when he pled guilty. When questioned by the post-conviction court, however, he acknowledged that when he pled guilty, he understood that he would be sentenced to eighteen years to be served at 100% with a possibility that it would be reduced to 85%. He also confirmed that he understood the charges and that he had decided to plead to the lesser offenses of aggravated sexual battery because child rape “is not a good thing to have on your record.”

The petitioner testified that he did not remember seeing the condition on his judgment form when he signed it forbidding him to ever again have any contact with his daughter, the victim, or her mother. He said that he had not wanted “to sign away rights to my child.”

The petitioner’s father, Russell Ray Jensen, testified that he had tried to raise money for his son to hire a lawyer but had been unable to do so before his case was set for trial. He said he did not believe his son had received effective representation, saying that at one point trial counsel said he could only spend fifteen to twenty minutes with the petitioner because he had over 200 cases to handle that day.

Trial counsel testified that he had been practicing law in Tennessee since 1995 and was appointed to represent the petitioner in March 2002 while employed at the public defender’s office. Counsel said that the petitioner had “numerous opportunities” to meet with him, but “he did not want me as his attorney. So he did not meet with me.” He stated that after the petitioner’s trial was set for January 22, 2003, he sent the petitioner three letters advising him “of the utter urgency of making

phone contact with him” and said that he and his office made numerous attempts to contact the petitioner by telephone, but the petitioner did not respond to the letters or the phone calls.

Regarding the number of continuances the petitioner received from the trial court, counsel said, “Quite frankly, I [was] amazed. I don’t recall in my six years with the [public defender’s] office ever getting this many continuances . . . it is very unusual for the judge after a second continuance to say just keep trying to get your lawyer.” He testified that during the continuances, the petitioner never spoke with him about the facts and circumstances of the case, and that the petitioner never called him or wrote him a letter. Counsel said that the reason he filed motions to withdraw as the petitioner’s lawyer was because the petitioner had indicated that he was hiring another attorney and would not talk to him.

Trial counsel said that when the petitioner’s bond was revoked, he met with the petitioner twice at the jail, and only then was he willing to discuss his situation. Counsel confirmed that he never pressured the petitioner to plead guilty, that he explained the nature of the charges against him, as well as the State’s burden of proof, and told him “that if he had defenses to raise that we would be entitled to do that.” He also acknowledged that he informed the petitioner that he had the right to remain silent or testify, that if he committed another crime in the future he could receive a harsher sentence based on his guilty pleas, and that he had an absolute right to go to trial. Counsel testified that he interviewed a witness from the Department of Children’s Services, but the petitioner told him not to interview the victim. Counsel said he had received discovery from the State and that he had shared this evidence with the petitioner at one of their jailhouse meetings. Counsel said the discovery included an audiotaped interview of the victim, an audiotape of the telephone call between the petitioner and the victim, transcripts of both audiotapes, medical records, and a transcript of the petitioner’s interview with the police.

Counsel testified that he discussed with the petitioner the State’s offers of an eighteen-year sentence in exchange for pleading to three counts of aggravated sexual battery, or a seventeen-year sentence if he pled to child rape. Counsel stated that the petitioner decided to accept the longer sentence because “he did not want to be titled a child rapist.”

Asked whether he had called the petitioner a “pervert,” trial counsel explained that at one point when he was talking to the petitioner on the telephone

he was questioning me about the issue of penetration. Whether, quite frankly, one of the issues was if he had put his lips upon the child’s vagina would that be considered penetration.

What I indicated to him, which I think is good advice, is when jury perceives [sic] perverted conduct, that they are quite often not willing to draw fine distinctions. There is case law that says that is penetration. Juries tend to believe that is penetration.

So I probably used the term perverted conduct under those circumstances.

Trial counsel explained that he did not interview the petitioner's brother or father because they could only testify the petitioner was "a nice person," and that would not have helped his case. Counsel acknowledged that he received a notice from the State of its intent to use the petitioner's prior Oklahoma conviction for indecent exposure as impeachment evidence and stated that he did not file a motion to suppress because he had planned to move for suppression once the trial started, outside the presence of the jury, and that he was confident his motion would have been granted.

Counsel testified that he did not file for a bill of particulars because, based on discussions with the State prosecutors, he "felt we were apprised of the events and what was going on." He specified that the State's allegations were as follows:

[T]he allegations were that the little girl had been made to put her mouth on the penis of the [petitioner]; that he had put his penis in her vagina; he had sex with her anally and then orally on her vagina. There were four different types of penetration that occurred over the [four-year] time frame set forth in the indictments.

Counsel also stated that he described these allegations to the petitioner and that had the plea agreement "fallen through," he would have "demanded" the State to inform him on what specific dates these events were alleged to have occurred.

ANALYSIS

Post-Conviction Standard of Review

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the post-conviction court "are entitled to substantial deference on appeal unless the evidence preponderates against those findings." Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001); see also Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review is of purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields, 40 S.W.3d at 458; Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

I. Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance

prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); see also State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. In the case of a guilty plea, "a petitioner who is seeking to establish that a deficiency resulted in prejudice must demonstrate 'that there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial.'" Howell v. State, 185 S.W.3d 319, 329 (Tenn. 2006) (quoting House v. State, 44 S.W.3d 508, 516 (Tenn. 2001)) (citing Hill v. Lockart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985)) (internal quotations omitted).

On appeal, the petitioner argues that he is entitled to post-conviction relief because his right to the effective assistance of counsel was abridged and that "but for [the] deficient representation, he would not have entered pleas of guilty to the charges he faced." In this regard, his specific claim is that trial counsel's failure to interview witnesses supplied by him, his father and brother, was an unreasonable decision under the circumstances and that "[f]ailure to conduct a reasonable investigation constitutes deficient performance."

The post-conviction court found that the "[p]etitioner failed to prove that testimony from his father and one of his brothers would have produced relevant evidence." The record supports the post-conviction court's determination: counsel testified that the petitioner's father and brother could have only testified that he was a "nice person" and that the petitioner and the victim "had gotten along." Counsel also said that the petitioner "seemed to understand" this testimony would not be helpful to his case. We note that since the petitioner did not produce witnesses to testify at the evidentiary hearing, he failed to show that he was prejudiced by the fact they were not called to testify at his trial. See State v. Black, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Accordingly,

we agree with the post-conviction court that counsel's decision not to interview them did not constitute deficient performance.

The petitioner also asserts that counsel "should have filed a [m]otion for [b]ill of [p]articulars because the indictments against the [p]etitioner did not sufficiently set out the time frames in which it was alleged that offen[s]es occurred" and that "[o]ther than the language of the indictment, neither [p]etitioner nor his attorney could have been apprised of the exact dates of the offenses, the manner in which they were perpetrated, or the exact location of the offenses." The petitioner contends that if counsel had filed for a bill of particulars "and obtained the necessary information, [p]etitioner would not have entered guilty pleas." On this point, the post-conviction court found that the petitioner "admitted to counsel he was guilty, told counsel he did not want a trial and that his primary interest was to negotiate a settlement involving convictions for only aggravated sexual battery," and that counsel did not need a bill of particulars from the State because "his pretrial investigation adequately apprised him of the allegations." The record supports this determination.

The petitioner also argues that counsel's failure to file a motion to suppress the Oklahoma conviction for indecent exposure "was an error of judgment that fell below" the constitutionally guaranteed standard of representation and that had he done so, the petitioner "may have been more inclined to take his case to trial and take the stand on his own behalf." Here, the post-conviction court ruled that no pretrial motions regarding impeachment were necessary because the issue could be addressed at trial. The record supports this determination.

Thus, as to each of these claims, the post-conviction court found that the petitioner had failed to show that he was prejudiced by counsel's alleged inactions; and the record supports this determination.

II. Denial of Additional Time to Hire Counsel

A criminal defendant has a right to be represented "by counsel whom he has chosen and retained," United States v. Micke, 859 F.2d 473, 480 (7th Cir. 1988), but "[t]his right is not absolute, but qualified, and must be balanced against the requirements of the fair and proper administration of justice." Id. (citations omitted). According to the United States Supreme Court, "a defendant should be afforded a fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 58 (1932). However, "the trial court has wide discretion in matters regarding the appointment and relief of counsel, and its action will not be set aside on appeal unless a plain abuse of that discretion is shown." State v. Branam, 855 S.W.2d 563, 566 (Tenn. 1993) (citing State v. Rubio, 746 S.W.2d 732, 737 (Tenn. Crim. App. 1987)).

The petitioner argues that it was error for the trial court to refuse him additional time to hire the attorney of his choice because doing so violated his constitutional right to counsel and that the trial court further erred by refusing "to permit the [p]etitioner's court appointed attorney to withdraw from the case." The post-conviction court found this claim to be "preposterous," concluding that the trial court "made every effort that could be reasonably expected to give [p]etitioner time to hire

his own attorney. The [trial court] also made sure that the [p]etitioner was at all times represented by the Public Defender's Office even though the [p]etitioner was uncooperative with both the [trial court] and" appointed counsel. We note that the trial court continued the petitioner's case six times in order to provide him with more time to hire an attorney, which gave him a period of nearly seven months to do so. The record supports the determination of the post-conviction court that the trial court did not abuse its discretion in refusing to continue the matter a seventh time for the petitioner to try to retain private counsel.

III. Whether the Petitioner's Guilty Pleas Were Knowingly and Voluntarily Entered

Lastly, the petitioner contends that his guilty pleas were not knowingly and voluntarily entered because trial counsel gave him erroneous advice "regarding what the possible parole eligibility date would be depending on whether he plead [sic] guilty to rape and received 17 years or whether he would plead guilty to aggravated sexual battery and receive 18 years."

The record on appeal includes a copy of the transcript of the petitioner's submission hearing and shows that he was questioned at length and in detail about his pleas of guilty. The post-conviction court found that the petitioner "understood the settlement when he pled guilty," stating that the pleas were "knowingly, intelligently, and voluntarily made" and that the petitioner had "wanted a settlement that did not involve a [c]hild [r]ape conviction and his counsel successfully negotiated such a settlement." The record supports this determination.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the post-conviction court's order of dismissal.

ALAN E. GLENN, JUDGE